***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

# BRIEF FOR APPELLANT AND JOINT APPENDIX

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 18,257

57

JOSEPH O. JANOUSEK,

Appellant,

v.

HERBERT M. NEYLAND,
SUSANNE NEYLAND, as next friend
of MICHELE MARIE NEYLAND, an
infant,
WELDON A. PRICE,

Appellees.

Appeal From The United States District Court

For The District Of Columbia



JOSEPH O. JANOUSEK, Pro Se
American Security Building
Washington, D. C.

## STATEMENT OF QUESTION PRESENTED

May an attorney's rights of lien on a judgment he has obtained under a contingent fee contract, and his right to compensation under that contract, breached by his clients, be derogated in the District Court?

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## INDEX TO CITATIONS

UNITED STATES COURT OF APPEALS

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# BRIEF FOR APPELLANT

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## JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia, providing for the distribution of funds deposited in the Registry of the Court, representing in part partial payment of attorney's fees due the appellant under a contingent fee contract, secured by his attorney's lien, the said order having been entered without hearing on appellant's professional lien, and the order containing provisions disparate with those governing under appellant's contract with his clients. The order of distribution appealed from was entered in the District Court on August 6, 1963, This Court has jurisdiction under Tile 28, §1291, United States Code.

## STATEMENT OF FACTS

Before relating facts pertinent in this appeal, appellant will point out that the order appealed from is an order showing the consent of the appellant, through counsel who represented him at that time and shortly afterwards withdrew (before provisions of that order had been fully carried out) because of a conflict of interest said to have developed. (J.A. 7)

Appellant does not deny the binding character of that order (except in one particular, to be taken up below, where the order is without his consent) in so far as it provides for the distribution of funds theretofore paid into the court's registry and distributed to date under the order of August 6, 1963. Appellant does vigorously oppose and contest and dispute that the order concerned -- entered without recognition of or hearing on his attorney's lien for fees due him, as governed by his contract with his clients, and dictating provisions of payment disparate and in conflict with the fixed and governing terms of an attorney-client contingent fee contract -- is in any way binding upon him on attorney's fees of some $25,000 yet due him. Nor can the order, thus entered without according appellant his right of hearing on his lien, as required repeatedly by decisions of this Court, be in any way binding upon the appellant for the payment of fees due him under his contract which may in future possibly again occur by payment of money into the Registry of the Court below. Additional facts are these:

After several months of preliminary investigation, medical research and study, the appellant in late 1956 was urged and consented to represent Herbert M. Neyland and his injured child Michele Marie Neyland in a malpractice claim against several Virginia physicians. (J.A. 8, 9, 24)

The claim was a tenuous one, depending for its validity on, among other things,

the development of certain scientific factors in hematological practice (then largely unresolved, on which scientific controversy was at that time about at its apogee), and in medical science underlying questions of negligence upon which the establishment of liability would hinge. (J.A. 10, 11, 12, 17, 18) As the statute of limitations had run against the father's claim in Virginia several months before these appellees had first consulted the appellant, the procedural difficulties confronting the claims were pointed out, as well as the risks and problems incident to filing and prosecuting the action in the District of Columbia, a jurisdiction not the domicile of the defendants, where the more substantial claim of the father was not yet barred by limitations. (J.A. 11, 14, 5) The parties discussed and recognized the likely long and arduous course the action would run, the costs necessary to prosecute it effectively, the risk of loss inherent in it and the application of effort and study which would be required when working, as would be necessary, in a branch of medical science (the practice of immunohematology in clinical hematology as applied to obstetrics and pediatrics) described by eminent specialists as one of the most complex in medical science. (J.A. 17, 18, 9-18, 4) These problems of more than average proportions notwithstanding, the appellees Neyland urged the appellant to proceed as counsel for them on the claims. A contract was made providing for a contingent fee and for payment of costs and expenses of prosecuting the action by the clients as they accrued. Terms of the contract appear in the record in the District Court proceeding now included in the Joint Appendix. (J.A. 12-16) Thereafter appellant filed the action in the District Court which he has prosecuted since 1956 through to appellate affirmance by this Court of judgments of $100,000 for the appellee Herbert M. Neyland and $20,000 for his daughter Michele Marie Neyland. (Price v. Neyland, 115 U.S.App. D. C. 355, 320 F. 2d 674.)

The appellant's prosecution of these claims over the period of years has led to the offices and laboratories of numerous medical scientists and specialist practitioners in both the United States and abroad, some of them of acknowledged and outstanding eminence in the medical science concerned, with whom the appellant has worked, and some of whom have served as medical consultants and specialists for the plaintiffs in the malpractice proceeding. (J.A. 17, 18, 19, 20, 4) The appellees Neyland did not meet their agreement and contractual obligation to pay costs and expenses of prosecuting the claims as they accrued, and in consequence appellant, who has advanced the major part of them and assumed obligations for their payment, continues unpaid as do several of the medical experts who have testified and otherwise provided professional services to the appellees Neyland. (J.A. 5, 6, 11-14, 18, 21, 24, 25)

After affirmance of the judgments by this Court and denial of the judgment debtor's petition for rehearing, the appellant attorney further notified the Neylands that he was continuing to insist that the judgment debtor's insurer pay that part of the judgment on which it had acknowledged liability (an acknowledgment obtained by this appellant several months before when he was demanding a supersedeas during the appeal) and that as a result about $80,000 was about to be paid on the judgments and interest accrued. (J.A. 20-22, 24-26)

The appellant subsequently learned that the Neylands upon receiving this information, and while communicating reassuringly with this appellant, had surreptitiously communicated also with the insurer in an endeavor to obtain payment of the funds to themselves to the exclusion of this appellant. (J.A. 26, 24-26) And shortly afterward the Neylands, in breach of their contract, purported to dismiss the appellant. (J.A. 20, 21) The insurer was notified by the appellant of his

attorney's lien. The local attorney, representing the insurer in this instance, moved to make payment of the funds into the Registry of the District Court, and this appellant assented to the motion. (J.A. 1, 2)

Being preoccupied on certain creative work for which the appellant has contracted, he informed counsel he had engaged in this matter that he would agree to a consent order of distribution in so far as these specific funds then on deposit in the Court were concerned. There was no intention or understanding whatever that the terms of the order of August 6, 1963, were to be applied to future attorney's fees to be paid, or that this order, entered without the established right of hearing on the lien, was in any manner to govern or to be viewed as a precedent in the substantial balance of attorney's fees due this appellant and to be collected by him. While seeking to dispose of the initial funds paid in on these judgments with the least possible distraction to himself, the appellant expressly reserved all of his rights under his lien for the full contractual amount of professional fees yet to be paid, including his right to a hearing, as set out in the appellant's petition for the enforcement of his attorney's lien now on file in the District Court proceeding. (J.A. 8-22)

The entry of the order of August 6, 1963, without properly including the name of the appellant as attorney to whom the attorney's fees were to be paid, as required by appellant's contract with his clients, was carried out without the appellant's consent.

Notwithstanding the limited character of the order of August 6, 1963, relating only to the funds on deposit in the Court as of that date, and to no other matters, the appellees Neyland have nevertheless improperly sought to urge that it constitutes the basis of settlement for fees yet to be paid this appellant. That urging has also

appeared in the pleadings in the District Court, and is manifest in their post-appeal motion to dismiss the petition to enforce appellant's attorney's lien. (J.A. 27, 23) And while without warrant or basis, the attempt so to construe the order improperly has necessitated this appeal.

## STATEMENT OF POINTS

The order of August 6, 1963, consenting to distribution of funds then on deposit in the lower court's registry, does not affect appellant's lien for unpaid attorney's fees fixed by the contingent fee contract, nor appellant's rights and property in the judgment secured to him by law under his attorney's lien.

## SUMMARY OF ARGUMENT

Under long existing common law principles, frequently reaffirmed by the decisions of this Court, appellant by his equitable charging lien has a proprietary interest and ownership in the judgment he secured for the appellee Herbert M. Neyland, appellant's interest being in amount the sum of the unpaid attorney's fees presently due him for professional services rendered in obtaining the judgment pursuant to his contingent fee contract with the appellees Neyland. The order of August 6, 1963, by which distribution of specific funds then in the District Court's Registry was carried out without reference to appellant's lien, under a consent arrangement to which appellant assented in part while reserving all rights of lien on the unpaid balance of fees due him, does not alter or affect appellant's lien or rights of lien and property in the judgment securing his his continuing unpaid attorney's fees.

## ARGUMENT

On attorney's fees due the appellant, yet unpaid and to be collected, the order appealed does not represent or constitute any agreement or acceptance by the

appellant of a scale of fees less than that called for by his contract with his clients. The order makes no provision of that kind, but is directed only to the payment and distribution of the specific funds which were then in the Registry of the Court, paid in by the insurer with the assent of this appellant.

Indeed, in discussions with the attorney employed by the appellant in this phase of the matter it was fully understood and agreed that the consent order to be entered was simply to carry out distribution of these funds without in any manner affecting appellant's right of lien and right to enforce collection of the full balance of attorney's fees called for by the breached contingent fee contract and yet to be paid.

Moreover, the appellant consented to the order of distribution not because he believed it fair or just, but because it became necessary to conserve his time inasmuch as he was working on a conspiracy case and at the same time trying to meet 1964 deadline dates, as called for by contract, on writing he is engaged with. The consent order of August 6th, pertaining only to the funds then on deposit in court, was authorized by the appellant in his need to conserve his time and avoid distractions and interruptions on his work. But this appellant did not in his consent in any manner consent to or authorize that the attorney's fees were to be paid to another person in his behalf, as the order was ultimately entered without this appellant's knowledge or consent, which was both contrary to his status as counsel and the contract controlling in this matter, and entirely an unwarranted, unauthorized and improper deviation from them.

As a matter of law, firmly fixed by the decisions of this Court and of courts of the United States generally, the appellant is vested with a proprietary interest in the judgment he has obtained to the extent of his unpaid attorney's fees. He is entitled, if the need develops, to a hearing on his petition to enforce his lien.

Falcone v. Hall, 98 U.S. App. DC. 363, 235 F2d 860; Friedman v. Harris, 81 U.S. App. D.C. 317, 158 F2d 187; Continental Casualty Company v. Kelly, 70 App. D. C. 320, 106 F2d 841; Evans v. Ockershausen, 69 App. D.C. 285, 100 F2d 695; Sullivan v. Tobin, 42 App. D.C. 430; Barnes v. Alexander, (1914), 232 U.S. 177.

Appellant is entitled to proceed with collection of the judgment he has obtained, to effect the payment of fees due him under the contract, in his own name and right independently of the appellees Neyland who have breached the contingent fee contract in attempted avoidance of the payment of attorney's fees. Kellogg v. Winchell, 51 App. D.C. 17, 273 Fed. 745; Falcone v. Hall, supra.

## CONCLUSION

Appellant respectfully prays that this Court by its order and judgment direct that the District Court extend to the appellant the right to proceed in his own name with execution on the judgment standing in the name of Herbert M. Neyland to the full extent of unpaid attorney's fees due the appellant under the contingent fee contract; or that the lower court, if the need appears or develops, extend to the appellant usual rights of full hearing on his lien for attorney's fees due under the breached contingent fee contract.

Respectfully submitted,

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# INDEX TO JOINT APPENDIX

# JOINT APPENDIX

(All of the following are from Herbert M. Neyland, et al. vs. Weldon A. Price, Civil Action No. 4231-56, United States District Court for the District of Columbia, wherein the appellant Joseph O. Janousek has since late July 1963 appeared in his own right as attorney-lienor.)

Motion of defendant Weldon A. Price for order granting leave to pay money into court and directing clerk to enter credits on judgment. (Filed July 26, 1963)

Now comes the defendant, Weldon A. Price, by his attorneys, Jackson, Gray and Laskey, and moves the Court for an order authorizing the payment into the Registry of the Court for credit on the Judgment herein of March 10, 1962 of the sum of Eighty Thousand, Five Hundred and Ninety Six Dollars and Thirty Eight Cents ($80,596.38), and for an Order directing the Clerk, upon receipt of said payment, to enter said Judgment and the interest and costs thereon as paid and satisfied insofar as the said Judgment against this defendant is in favor of plaintiff, Susanne Neyland, as next friend of Michele Marie Neyland, an infant, and insofar as the said Judgment against this defendant is in favor of the plaintiff, Herbert M. Neyland, to enter the credit of payment and satisfaction as to Fifty Thousand Dollars ($50,000.00) of the principal amount thereof and as payment of all costs incurred in this Court and on appeal and as payment of all interest on the entire principal amount of said Judgment incurred to the date of the filing of this motion and for grounds says: That this defendant is in receipt of requests and demands from one Joseph O. Janousek, counsel of record for the plaintiffs herein, which are at variance with instructions personally transmitted to the defendant's counsel by the plaintiff, Herbert M. Neyland, acting for himself and for his wife, the plaintiff Susanne Neyland, and by Richard W. Galiher, whom plaintiffs had advised counsel for this defendant is the only attorney now authorized to act in their behalf. This defendant further says that by reason of these circumstances and other circumstances more fully set forth

in the memorandum hereto annexed, he is uncertain as to whom payments on account of said Judgment can safely be made. /s/ John L. Laskey, Attorney for Weldon A. Price, etc.

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Response of Joseph O. Janousek, Attorney-Lienor, to motion for leave to pay money into court. (Filed July 31, 196

Joseph O. Janousek, attorney-lienor in this proceeding, files this as his personal response to the motion of Weldon A. Price, through counsel, to pay the sum of $80,596.38 into the Registry of the Court; and this is filed as this attorney's personal response to the additional request contained in the response of Mr. Galiher, taking his response beyond the scope of the defendant's motion, to which this attorney-lienor objects. And this attorney-lienor respectfully states to the Court as follows:

I

I do not object to the payment of the sum of $80,596.38 into the Registry of the Court, pending the usual opportunity accorded in these circumstances to present evidence on the disputed matters and issues so that the Court may consider such evidence to resolve the issues and may thereupon enter its order directing the Registry of the Court on the manner of the distribution to be made, should the parties herein not achieve a settlement.

II

I do object to the request appearing in Mr. Galiher's response (first paragraph) that the Court should, when entering its order allowing payment of the funds into the Registry of the Court on July 31st "at the same time order the appropriate and proper disbursement of said funds to the plaintiffs, and to counsel who have represented said plaintiffs during the course of this litigation." If settlement between the parties, which is indeed to be desired, cannot be announced to the Court on

July 31st, I object to this request for these reasons: First, this request, communicated to me less than twenty-four hours before presentation of the motion to the Court on July 31st, gives me no opportunity to present evidence and place before the Court the factors existing giving rise to the disputed issues. Second, the request, bringing in as it does, new matter, requesting an order beyond the scope of the pending motion, is in reality a motion in and of itself. It is subject to the requirements of Rule 7(b) F. R. C. P. governing the making of motions, and it is subject to the notice and time requirements of Rule 6(d) and (e) F. R. C. P. which requires notice of five days plus three where, as in this instance, service has been by mail. Third, in the absence of settlement of them, there are issues to be decided. Before the Court is actually in a position to direct the Registry of the Court by order on the payments to be made, there is evidence to be put before the Court (which from my standpoint I wish to put before the Court fully and in detail) to enable the Court to resolve the issues and enter the proper order. Mr. Galiher's request, which would preclude this, does not conform with settled law and practice in this jurisdiction, where the reception of evidence, hearing and decision on the issues is the right of the attorney-lienor where there has been a breach of a con tingent fee contract, as is the fact in this matter. The Court is respectfully referred to Friedman v. Harris, 81 U. S. App. D. C. 317, 158 F2d 187, and cases therein referred to, including Kellogg v. Winchell, 51 App. D. C. 17, 273 Fed. 745, 16 ALR 1159. Also Barnes v. Alexander 232 U. S. 117; Evans v. Ockerhausen, 69 App. D. C. 285, 100 F2d 695, 128 ALR 177; Continental Surety Company v. Kelly, 70 App. D. C. 320, 106 F2d 841; Counsman v. Modern Woodmen of America, 69 Neb. 710, 96 N. W. 672, 98 N. W. 414; Woodberry v. Andrew Jergens Co. (CCA 2d 1934), 69 F2d 49; Lawrence v. Commodore Navigation Co. (SDNY 1939) 27 F. Supp. 139, affirmed 108 F2d 563.

III

I have necessarily invoked an attorney's lien in protection of my interests because of occurrences in this case. In the absence of adequate time to prepare a detailed and documented memorandum of these occurrences and the extent of my professional services, I respectfully submit at this time merely this brief and incomplete recitation:

I was employed on a contingent fee contract in 1956, and I have rendered services under it continuously until July 22, 1963, when my client discharged me without cause in breach of his contract at a time when all services have been rendered save for the payment of funds on the judgment. My services have been extensive from their inception to the present moment. The case was tried upon my preparation and the theory of liability (partially set out in my pretrial statement which is incorporated in the pretrial order) developed through consultation with medical experts in the field of immunohematology, pediatrics and obstetrics in various sections of the United States over a period of several years, including my examination of laboratory procedures, and my study of this case with and under the tutelage of medical experts. Mr. Galiher worked with this data throughout the trial, when I was in communication with him constantly by telephone with medical experts in other parts of the United States literally at my elbow, as Mr. Galiher was instructed in the science. I sent specialized texts to him, marked for his use and specially indexed for his ready reference. These were used in cross-examination and for other purposes during trial. The major part of the appellees' brief in the Court of Appeals is entirely my work and my writing; every part of the brief relating to the science and theory of medical liability (which was strongly attacked by the appellant) is in every word my work and my writing. If it becomes necessary, I wish to set before the Court

fully documented and in full detail, just what my services have been on this case in which I have devoted unceasingly my time, my effort and every drive and professional skill and effort in the past seven and a half years in faith in the case, in faith in my clients and my desire to be of the best professional assistance to them and to the pitiable little child.

My contract provides, and Herbert M. Neyland expressly agreed with me, that in the event this case travelled the full course through preparation (on which eight months were spent in 1956 before I even filed the complaint), trial and an appeal, the attorney's fee would be 50% of the amount collected on the judgments. This is disputed by the clients. I am prepared to offer proof and establish it.

I brought Mr. Galiher into this case with me, as associate trial counsel, in December 1961. He was unacquainted with my clients, and I employed him by virtue of authority I had reserved in my contract with my clients to employ associate counsel, as might become necessary, both in the District of Columbia and in the State of Virginia, which I desire to go into very fully before this Court if it becomes necessary; this express authority in my contract with my clients was especially essential as to Virginia counsel. There the statute of limitations had run against the father's claim before they first consulted me. I accordingly agreed and contracted with Mr. Galiher to come into the case as my associate, under which I am to pay him fifty percent of my collected fee. There is no dispute on this.

There is apparently an issue as to my bills, my costs and my advancements made in this case over the past seven and a half years. This, if it becomes necessary, I also wish to put before the Court and go into full detail, with, of course, bills and other pertinent data. I have made substantial advancements and incurred bills to properly prosecute this case to its present posture which I have been forced

to carry contrary to my agreement, contract and understanding with my clients in 1956 when I took on this case at their persuasion.

I respectfully state to the Court that I am under a deadline date on a memorandum to be filed in this case in the United States District Court for the Eastern District of Virginia on Monday August 5th. I am also working long hours on a conspiracy case in the middle-west, and I respectfully request that I be given two weeks, until August 14th, within which to file all pertinent data bearing upon the issues of my fee and costs and advancements due me from my clients, and that this matter be not set down for hearing before August 14th. I respectfully request to be fully heard should presently occurring negotiations for settlement fail. Respectfully submitted, /s/ Joseph O. Janousek, Attorney-Lienor.

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Order (for payment of funds into Registry of Court) (Filed July 31, 1963)

This cause coming on to be heard at this term on the motion of the defendant Weldon A. Price for leave to deposit in the Registry of the Court the sum of $70,000 as principal amount, $9000 as interest, and $696.38 as costs, and for an entry by the Clerk of payment and satisfaction of the judgment of this Court of March 1, 1962 to the extent of said payment, and upon consideration thereof, it is by the Court this 31st day of July, 1963, ORDERED that the defendant Weldon A. Price is given leave to pay to the Clerk of this Court, and the Clerk is directed to accept said payment of the sum of $80,596.38, and upon the making of said payment, the Clerk of this Court is directed to enter judgment of March 10, 1962 as credited and satisfied as follows: Judgment for plaintiff, Susanne Neyland, as next friend of Michele Marie Neyland, an infant, with interest thereon and costs paid and satisfied in full by the payment of the sum of $21,650 to the Clerk of this Court.

$50,000 of the principal amount of the Judgment against Weldon A. Price and in favor of the plaintiff Herbert M. Neyland, interest in the amount of $8,250 from March 10, 1962 through July 25, 1963 on the entire $100,000 Judgment in favor of the said Herbert M. Neyland, and the balance of all costs taxed herein and on appeal, received by the payment of the sum of $58,946.38 to the Clerk of this Court leaving $50,000 with interest from July 31, 1963 without any costs to date due on the judgment unpaid of Herbert M. Neyland. /s/ George L. Hart, Jr.

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Order for distribution of funds in the registry of the court. (Filed August 6, 1963)

It appearing that there is now in the Registry of the Court to apply upon the judgments heretofore rendered for the plaintiffs the sum of $80,596.38; and it further appearing that all parties in interest including the plaintiff Herbert M. Neyland, father of the infant plaintiff, as well as Susanne Neyland, mother and next friend of the said infant plaintiff Michele Marie Neyland have consented hereto; The said Herbert M. Neyland having consented hereto both in person and by counsel and for good cause shown, it is by the Court this 6th day of August, 1963; ORDERED that the Clerk of the Court prepare and deliver forthwith upon the entry of this order, to the persons indicated, checks against the said sums as follows: To Richard W. Galiher, the Attorney's fee relating to the judgment in favor of the said infant herein (this being an amount equal to one-third of said judgment) $7,216.66, as the attorney's fee relating to the judgment in favor of the said Herbert M. Neyland, $23,300.00; total $30,516.66. To Herbert M. Neyland on account of net costs taxed herein and on appeal, $696.38; as representing balance from amount paid on account of judgment in his favor deducting the hereafter set forth sum set aside as a reserve for reimbursement for costs, $31,540.64; total $32,237.02.

And it is further ORDERED that there be retained in the Registryof the Court, from the amount deposited on the judgment in favor of Herbert M. Neyland, as a reserve for reimbursement for costs and expenses advanced by Joseph O. Janousek, the disbursement of which in whole or in part shall be supported by affidavit and shall be subject to further order of this Court, the sum of $3,409.37. ORDERED that the share of the judgment in favor of said infant after the disbursement of the aforesaid attorney's fees attributable to said share shall remain in the Registry of the Court and subject to the further order of the Court and pending the appointment of a guardian to receipt therefore, the sum of $14,433.33. Total of said deposits hereby accounted for $80,596.38. /s/ George L. Hart, Jr.

We consent: Joseph O. Janousek, By John W. Jackson /s/ Counsel; Susanne Neyland, as next friend of Michele Marie Neyland, an infant, By Richard W. Galiher /s/ Counsel; Herbert M. Neyland, By Richard W. Galiher /s/ Counsel; Herbert M. Neyland /s/ in Proper Person.

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Petition to enforce attorney's lien on judgments, on funds to be paid on judgments, and for related relief. (Filed August 11, 1963)

Joseph O. Janousek, the attorney-lienor herein, respectfully petitions and states to the Court as follows:

I

On October 23, 1956, this attorney contracted on a contingent fee basis with Herbert M. Neyland, acting for himself and for his infant daughter, Michele Marie Neyland, to prosecute the within medical malpractice case against four defendants named in the complaint herein, two being obstetricians practicing in partnership and two being pediatricians practicing in partnership, all in practice primarily in the State of Virginia where

their offices are situated.

II

The contract between this attorney and the said Herbert M. Neyland, made on October 23, 1956, followed more than eight months of thorough investigation, medical research and study and medical consultation with experts in the fields of blood pathology, obstetrics and pediatrics. The investigation included data obtained from the hospital records in this case prior to the notice of any claim or the filing of suit, and a blood examination, made at the direction of this attorney to Herbert M. Neyland, of the blood of the parents and of the afflicted infant, by the laboratories of Dr. Oscar B. Hunter. The report of that blood examination on April 10, 1956, began to indicate the existence of liability on the part of the prospective defendants, when viewed in the cast of the data obtained from the hospital records and other factors. As the months progressed, during which this attorney was in regular and frequent communication with Herbert M. Neyland, reporting to him the results of this attorney's consultations with medical experts in this field in other parts of the United States, it began to appear that a theory of liability might be developed against the prospective defendants who, it appeared, had been responsible for a number of omissions. It further appeared that these omissions, in the cast of the medical science involved, were likely the causation of brain area injuries to the infant Michele Neyland who, then as now, lives in a comatose stupor, wholly incapacitated, immobile, incontinent and bedfast.

III

Early in February 1956 this attorney had agreed conditionally to look into the matter at the persuasion of Herbert M. Neyland and others. At that time this attorney had informed Mr. Neyland that because of the pitiable condition of the child he would go forward with the investigation and study of the matter, that he

would need to consult with medical experts and familiarize himself with the medical elements present. The petitioner states that the basis of liability in this case, its existence or nonexistence, came within an extraordinarily complex and technical phase of medical science dealing with blood, its elements, the interpretation of blood group reactions, very involved laboratory and related procedures, in addition to the factors and standards of practice in the branches of obstetrics and pediatrics into whose already specialized areas of medicine this blood science (termed immunohematology) extended in the setting of the birth of the child under the supervision of the defendant obstetricians and her postnatal care by the defendant pediatrician in this case.

This attorney had pointed out these complexities, with others, to Herbert M. Neyland; had told him that he did not know whether liability existed, or whether a provable theory of liability could be developed, but that this attorney would do everything within his power to investigate, sift through all of the facts, and would leave no possibility or circumstance indicative of liability unturned. This attorney stated to the said Herbert M. Neyland that he did not want to be bound to go forward in the case until he had reached a decision following the investigation and study, whereupon he would advise the said Herbert Neyland of his findings, and give his opinion whether there was sufficient basis for proceeding with an action or not, and he would then sit down with him and go over all of the factors and elements showing why, in this attorney's opinion, he might, if he so decided, proceed, or why he should not proceed with a malpractice action against the defendants.

At the outset of this matter in February 1956, and in its course to October 23, 1956, this attorney informed the said Herbert M. Neyland that if in this attorney's opinion no action should be instituted, there would be no charge for professional

services but that this attorney would ask only that the said Herbert Neyland would pay investigation and similar charges paid out by this attorney, and would pay and reimburse this attorney for travel in seeing medical experts in blood pathology beyond the District of Columbia. This attorney informed the said Herbert M. Neyland (for reasons it is unnecessary to disclose at this time in the petition) that it would be preferable to try to obtain expert advice, opinion and assistance beyond the District of Columbia area. The said Herbert M. Neyland was of the same opinion, This attorney further informed him that if upon reaching conclusions and arriving at a proper decision this attorney was of the opinion that an action could be maintained against the defendants, there would be a full discussion of all factors, with a full and final discussion of the terms on which this attorney would be willing to proceed in the case. At the outset of this attorney's conditional entry into the matter in February 1956, and in succeeding months, it was fully agreed and understood that if this attorney did proceed with an action in behalf of the said Herbert M. Neyland and his daughter, professional fees would be on a contingent basis.

IV

A few days after this attorney's first conference with the said Herbert M. Neyland on February 4, 1956, this attorney advised him that aside from the massive technical and scientific ramifications surrounding the question of liability, there were procedural complications as well. He was informed that among the latter the statute of limitations had run against his own claim in the State of Virginia, where the child was born and where the parties live; but that it had not run against his personal claim in the District of Columbia. And the said Herbert M. Neyland was further informed on this and other legal and procedural problems inherent in the matter which, this petitioner respectfully states, it appears unnecessary

to set out in this petition at this stage of this proceeding on the lien. This attorney respectfully states that the factual recitals being set out in this petition, both heretofore and following, do not in any sense purport to be a full account, or even a complete resume, of the services rendered in this case on which this attorney has a number of massive files by which this petition will be fully documented and supported. But that the facts set out herein are rather a very incomplete distillation of a few of the cardinal occurrences and factors pertaining to this attorney's continuous and extensive professional services rendered from 1956 to July 22, 1963, when, as funds to be applied in payment of the judgments were being made available, this attorney suddenly received from the said Herbert M. Neyland a letter discharging this attorney without cause in breach of the contingent fee contract.

VI

Referring to October 23, 1956, this attorney respectfully states that he had Herbert M. Neyland come to his office. That on that day several hours were spent going over with him the results of the preceding eight and a half months of study and investigation of the case; and that at the conference on October 23, 1956, among numerous details discussed at great length on the aspect of liability and possibility of its proof within the area of the medical science governing, the terms of the contingent fee contract were fully discussed, and agreed upon, among them the following provisions on which there has been full and express agreement:

(a) That upon his investigation and study of the case this attorney was of the opinion that liability existed and could be proved, notwithstanding strongly dissentient opinion this attorney had encountered on the part of some medical experts on some of the factors on which liability appeared to turn.

(b) That tremendous application would be required in the specialized medical

field to further formulate, develop and establish the theory of medical liability this attorney believed existed through his study of medical authorities and consultation of medical personages working in the field; that the theory of liability upon which this attorney was proceeding appeared possible of proof, but that the demands and task of this case would be exacting and heavy. With this the client agreed.

(c) That if he proceeded with the cause, this attorney would want express authority to continue to consult with medical experts (that he intended in the course of these consultations to see, if necessary, the most eminent medical authorities in the science involved) and act under their guidance and opinions as well as his own independent study which he would continue in the science; that he would want to consult with these doctors and others in various parts of the United States and that this attorney would want his expenses of travel paid by the client irrespective of the outcome of the case. Herbert M. Neyland (hereinafter referred to as "the client") expressly agreed to these provisions.

(d) That in proceeding with this cause this attorney would want, as might become necessary, specialized medical texts, authoritative articles, reproductions from medical literature and similar items essential to the effective prosecution of the action, for which this attorney would require reimbursement from the client irrespective of the outcome of the cause. The client expressly agreed to these provisions.

(e) That in proceeding with the cause this attorney would require the client's authorization to him to employ such medical experts as in this attorney's judgment would be needed to effectively prosecute the action, and that this attorney would require reimbursement by the client for charges made by the doctors and experts irrespective of the outcome of the case. The client expressly agreed to these provisions.

(f) That irrespective of the outcome of the action this attorney would want

reimbursement for such expenses as long distance telephone calls made in connection with the case; and that if this attorney in his judgment believed that further services of an investigator were needed to effectively prosecute the case, this attorney would be authorized to employ such investigator for which this attorney would be reimbursed by the client irrespective of the outcome of the case. The client expressly agreed to these provisions.

(g) That all court costs, such as filing fees, service of process, depositions and any briefs which might be required on appeal, and related costs in court, would be paid by the client irrespective of the outcome of the case. The client expressly agreed to these provisions.

(h) That as the statute of limitations had run against the claim of Herbert M. Neyland in Virginia in 1955, but not in the District of Columbia, where the action could be brought, where the afflicted child had been examined and partially treated, where some of the prospective witnesses were, and where, as this attorney's investigation in the preceding months had shown, the prospective defendants were on the staffs of hospitals where they appeared to have patients from time to time (and one of the prospective defendants appearing to be a resident of the District) that this attorney would proceeed with the action in the District of Columbia, but not in Virginia, for these and other reasons pointed out in detail to the client. With this course of action the client expressly agreed.

(i) That this attorney would likely have to employ a special process server to effect personal service of process on the prospective defendants, particularly if the Marshal's office was unable to obtain service within a reasonable time after the action was filed; that the expense of any such special process server would be paid by the client irrespective of the outcome of the case. The client expressly agreed to this provision.

(j) That this attorney had no means of determining whether the prospective defendants were insured, or whether any insurance they might have would be sufficient to meet any judgment which might be obtained. (Within the months preceding October 23, 1956, the client had provided this attorney with certain information which in his view indicated the financial responsibility of the defendants, which at this point, in the making of the contract on October 23, 1956, he again called to this attorney's attention and proceeded to implement the information and his views that the defendants were amply responsible financially.) That in the event a judgment was obtained, and problemsof collectibility arose, this attorney informed the client that he would want full authority to employ associate counsel of his choice in the State of Virginia. And that similarly, if this attorney wished to employ associate counsel in the cause in the District of Columbia, he wanted to reserve full authority to employ such associate attorney as he might choose. The client expressly agreed to these provisions.

(k) The client was informed that in the ordinary negligence case the attorney's fee on a contingent basis was often one-third of the recovery with an additional percentage provision where an appeal from the judgment ensued or where problems of collectibility arose; that this case, founded upon malpractice, with its complexities and the prospect of intense work in an exceedingly technical field, where there was great reluctance on the part of medical experts and personages to forthrightly express their views or become involved in any way (as this attorney explained he had already experienced), which would involve travel as well as time, and many times the professional time and effort of the ordinary negligence case for personal injuries, made the often charged 33-1/3% percent fee inadequate in this instance; that this case could take one of several directions, any one of which would be preceded by far

and substantially more time and effort than in the usual negligence case; that this attorney would undertake and agree to prosecute the action under the following contingent fee scale, the course of the case to govern which of the three contingent percentages would be charged: that if the case were settled within a short time after suit was filed, the contingent fee would be 35% of the amount of the settlement, in addition to the discussed costs and expenses necessary to prosecute the case to that point; that if the action was tried and resulted in a judgment from which no appeal was taken, the contingent fee would be 40% of all amounts collected on the judgment, in addition to the discussed costs and expenses necessary to prosecute the case to that point; that if there was an appeal after judgment, or if problems of collectibility arose requiring execution on the judgment, whether there was an appeal or not, the contingent fee would be 50 % of all amounts collected on the judgment, in addition to the discussed costs and expenses necessary to prosecute the case to that point. To these conditions, which were talked over with the client in detail, on which he raised no question whatsoever, the client fully and expressly agreed on October 23, 1956.

VII

On October 25, 1956 this attorney filed the complaint in this action against the four defendants, two of whom (one in the partnership of the obstetricians, one in the partnership of the pediatricians) were ultimately served. As stated in paragraph V above, this attorney will not in this petition undertake anything beyond a very brief, skeletal, incomplete and general reference to his professional services rendered continuously and extensively from 1956 to July 22, 1963 when the said client wrongfully and in breach of his contract of October 23, 1956 discharged this attorney without cause upon having learned that the insurer was about to make a substantial payment on the judgments; this attorney's discharge by the client, in breach of contract,

occurring at a time when the petitioner's professional services, save for the collection of the now affirmed judgments, have been fully performed.

Pending the filing of a full and fully documented recitation of the professional services rendered pursuant to the contract over the past more than seven years, this attorney respectfully states to the Court concisely:

That the services he has performed have been extensive and thorough from their inception and throughout the course of the contract until its breach by the client on July 22, 1963. This malpractice case has been in the highly technical and specialized field of immunohematology, extending into obstetrics and pediatrics in medicine. The case has required constant and continuing study and effort in its development. Because of the defenses made it has been necessary to know, show and establish the state of the science as it existed prior to the child's birth in 1953, as it existed at the time of the child's birth and as it presently exists. The size and scope of medical literature on the subject is gargantuan, in some respects confused and occluded by divergent opinions on the part of the doctors who have undertaken to write on the subject and express opinions without sufficient case history and study and background to support their minority views which were, nevertheless, employed in some respects in the defense of this case both in this Court and in the Court of Appeals.

The theory of liability which this petitioner formulated, upon which he filed the action and upon which the recovery has been made (set out in part in the plaintiffs' pretrial statement wholly prepared by the petitioner, some of which is incorporated in the pretrial conference order, and which appears in somewhat more detail in the appellees' brief in the appeal), was strenuously opposed by the defendants. The judgments obtained have been affirmed on appeal, constituting a case of first impression on the theory of medical liability which this petitioner developed and

advanced, upon which he predicated the claims, upon which they went to trial and upon which they were affirmed.

As is indicated in the appellate opinion, and as appears in the briefs, underlying the questions of liability are a maze of technical factors and principles upon which liability turns. The development of this case and its theory of liability over the several years it has been in litigation has required constant work and consultation by this petitioner in the science involved. The answers to interrogatories, directed by this petitioner to the defendants in November 1960, provided the turning point on the question of liability, and made possible the proof of that liability. The interrogatories were prepared, with the aid of a medical consultant, after considerable and thoughtful study of the case in the setting of critical medical factors affecting liability.

This attorney has undertaken specialized study in this very interesting but exceedingly technical phase of medical science, its laboratory and other procedures related to it. To develop this case and to be able to prosecute it effectively both from the standpoint of substantive law and methods of proof, this attorney has regularly, almost constantly in the course of this case conferred and consulted with leading medical specialists, including Dr. Alexander H. Wiener, the surviving co-discoverer of the Rhesus factor in human blood from which this complex science took root in about 1937, expanding within a few years into perhaps one of the most important sciences in obstetrics, pediatrics and other branches of medicine where blood factors, reaction agents, their effects and consequences play a role.

This petitioner's work and study in the field for purposes of prosecuting this case most effectively in the clients' interest has extended to consultation with such specialists in various parts of the United States; and the study and research undertaken to advance this case have been made both in the United States and Europe, in the latter countries without additional cost to the clients.

Mr. Galiher, whom I brought into the case as associate counsel in December 1961, has proceeded as I have directed on the theory of medical liability, working with me and with the scientific data I have provided throughout the trial and for several months before, instructing and directing him in the science and the elements in it giving rise to liability as a matter of law in this case. Through arrangements agreed upon between us, Mr. Galiher tried the case, and throughout the trial I was in communication with him constantly by telephone while I consulted with medical experts in the science in different parts of the United States, instructing him on the elements to be proved, their inter-relationship, their cause and effect and their ultimate bearing upon the proof of acts of the defendants, and failures of the defendants to act, constituting negligence and gross omissions in the establishment of liability. During the trial I obtained, under the guidance of some of the medical experts with whom I was, references to leading texts and articles; these were obtained and indexed, notes made on them, and they were rushed back to associate counsel trying the case by special carrier; and these were used for cross-examination and for other purposes in the trial.

The major part of the appellees' brief in the Court of Appeals is entirely of this petitioner's preparation, this petitioner's work, this petitioner's writing. Every part of the appellees' brief pertaining to the medical science and factors and theory of medical liability (which the appellant strenuously challenged and disclaimed) is exclusively and in every word this petitioner's work and writing.

Following affirmance on May 2, 1963, the appellant again challenged the theory of liability, elements of the medical science the appellees had shown negligence under; the appellant questioned the Court's interpretation of the scientific factors, disagreed with the Court's opinion and the language used by the Court in relating the medical

elements and factors underlying liability. The appellant by petition for rehearing requested a hearing by the Court en banc, urging numerous reasons. The answer to the petition for rehearing and for reconsideration by the Court en banc was prepared entirely by this petitioner. On July 2, 1963, the Court of Appeals, upon consideration of the petition and answer, en banc denied the petition.

VIII

In accordance with the express authorization reserved by this attorney in his contract with his clients on October 23, 1956, to employ associate counsel of his choice, this attorney in December 1961 employed Mr. Richard W. Galiher to enter this cause as his associate. Mr. Galiher so entered this cause under an agreement with this petitioner providing for an equal division of this attorney's fee (to be received by this attorney under his contract of October 25, 1956 with his clients) between this petitioner and Mr. Galiher.

IX

Following this attorney's receipt on July 22, 1963, of his client's letter discharging this attorney, the said Herbert M. Neyland in further breach of the contract of October 23, 1956, has failed and refused to pay, as required by the express terms of the contract he made, the attorney's fee of fifty percent of the recovery, and he continues to refuse the payment under the contract.

X

By deposit of funds in the Registry of the Court, the judgment on behalf of the infant Michele Marie Neyland, and interest thereon to July 25, 1963, have been fully paid. By the same deposit in the Registry of the Court there has also been paid on the $100,000 judgment of Herbert M. Neyland the amount of $50,000, with interest to July 25, 1963 and taxed costs. By a consent order of distribution

entered on August 6, 1963, the funds have been disbursed (except for $3,409.37 remaining on deposit for disbursement to this petitioner for costs and expenses he has advanced in the prosecution of the litigation which the client has not paid in accordance with the contract of October 23, 1956) in payment of the attorney's fee on the $20,000 on behalf of the infant; and as to the funds so deposited in the Registry of the Court, there has been a partial payment of the attorney's fee on the $100,000 judgment of Herbert M. Neyland. There has been a payment of $50,000 on the principal amount of $100,000 of the judgment of Herbert M. Neyland.

XI

Under the controlling contingent fee contract of October 23, 1956, there remains a balance of attorney's fees due this attorney equal to fifty percent of $50,000, being the sum of $25,000, plus fifty percent of all interest which will accrue on the judgment from July 25, 1963 to the date this judgment is fully paid and satisfied.

This attorney therefore petitions hereby to enforce his equitable charging lien against the judgment and against all amounts to be paid on account of the judgment and interest on the judgment; the amount of this petitioner's fee secured by the lien being $25,000, plus fifty percent of all interest accruing on the unpaid balance of $50,000 on this judgment from July 25, 1963 to the date the said judgment is fully paid and satisfied.

WHEREFORE, the petitioner prays and demands judgment enforcing his attorney's lien for professional services he has rendered in this cause pursuant to the terms of the contract for professional services made by and between this petitioner and Herbert M. Neyland on October 23, 1956; that upon final consideration hereof an order be entered vesting in this petitioner and in his individual name, in enforcement of his lien, a fifty percent individual and separate property interest in the judgment

of $100,000 (on which there is an unpaid balance of $50,000) presently standing in the name of Herbert M. Neyland, plaintiff herein; that the Court's order in enforcement of the lien further vest in this petitioner, as his separate and individual property, fifty percent of all moneys paid on account of interest on the said judgment from July 25, 1963 to the date the said judgment is fully paid and satisfied; and for such other and further relief as to the Court appears just and proper. /s/ Joseph O. Janousek, Petitioner.

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Points and authorities in opposition to petition to enforce attorney's lien on judgments, on funds to be paid on judgments and for related relief (Filed August 16, 1963)

There are two areas of controversy between the plaintiffs and Joseph O. Janousek, Esquire, one, with respect to the amount of attorney's fee to be charged and, two, with respect to his claimed right to reimbursement of monies which he has allegedly expended in connection with his services rendered in this case. The plaintiffs have always stood ready to pay Mr. Janousek a proper and reasonable attorney's fee. This is likewise true with respect to the costs for which he requests reimbursement. The plaintiffs do not believe an attorney's fee of 50% to be fair and reasonable with respect to any monies which will be collected on the balance of the judgment due in the case of Herbert M. Neyland versus the defendant. This Court has previously approved an attorney's fee of one-third of the monies collected in the case of the minor plaintiff. The plaintiff believes that the maximum fee that should be charged on any additional monies that may be collected should be in the amount, 40% . With respect to the costs for which Mr. Janousek requests reimbursement, the adult plaintiff has always been agreeable to the payment of the same provided an itemization and proper explanation of the costs were furnished him. In the opinion of the adult plaintiff, neither a proper explanation nor itemization has been

furnished. This Court should, therefor, conduct a proper hearing as to the costs for which counsel requests reimbursement and determine what, if any, sums should be paid by the adult plaintiff out of the Registry of the Court. Since there are no other monies available at the present time with respect to the judgment of the adult plaintiff, the Court should deny the petition which attempts to enforce an attorney's lien and should simply pass an order with respect to the amount that should be charged in the way of attorney's fee should any additional sums be collected.

/s/ Richard W. Galiher, Attorney for plaintiff Herbert M. Neyland. (underscoring added)

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Reply to answer in opposition to petition for enforcement of attorney's lien. (Filed September 5, 1963)

The answer in opposition to the petition for the enforcement of this attorney's lien refers to nonexistent "areas of controversy." Mislabeling a situation such as this, and miscasting the plaintiffs in a role quite opposite to that they have actually filled cannot subordinate or alter unsavory facts of record. And no amount of gilding, or mislabeling, or common gerrymandering, or side-stepping of unalterable and governing fact will either change or remedy or succeed in making less obvious the improprieties committed and presently existing, the deceit and artifices to deceive which have been practiced, and the unprincipled maneuvering carried on surreptitiously by and with the plaintiffs, without knowledge of this attorney until recently, in furtherance of an effort to evade the plaintiffs' obligation of contract, and by sham, deception and interference with the attorney-client relationship and the contract, prevent payment of this attorney's fees.

There is no controversy over fees. And none can be created and fashioned out of sheer sham and pretension brazenly played and flaunted in the face of binding

contractual terms, much less be supported by ill-considered assertions, as impotent in the circumstances of this matter as they are ill-founded, emanating from one who has made himself and who now stands as little more than an encroacher acting in conflict of interest, who has assisted in the contrivance and in provoking a breach of contract in interference with the contract governing the prosecution of this cause and governing the attorney-client relationship between this attorney and the plaintiffs, and the payment of attorney's fees and costs thereunder; assertions by one who, indeed, is without position or authority, knowledge or competency to make them -- and none of which, it is to be added, has the slightest pertinency or bearing upon fixed contractual terms that are impervious to and not capable of change by acts of sham, deception and the unsavory underplay that has accompanied the breach of contract by the plaintiffs in this case.

As the petition for the enforcement of this attorney's lien sets out, the amount and method of payment of attorney's fees are fixed and governed by a detailed and eminently clear contingent fee contract between this attorney and his clients, the parties Neyland, who in 1956 made that contract, who prevailed upon this attorney to enter the cause and to proceed in their behalf, who have by that contract and this attorney's belief in their representations of claim, in their need, and, until recently, in their integrity and reliability, managed to secure from this attorney professional services for over seven years by which judgments of $120,000.00 have been obtained, who have not within that long period of professional services questioned the contract or disputed its terms, and who sat silently by without disclosing any indication of their intention to breach the contract so long as there remained professional work to be done by this attorney (so long as the fate of the case hung in the balance) without whom and whose learning and capacities and professional application this cause -- which this attorney after long study and application formulated, brought into being and molded

into legally cognizable and redressable form -- would have at any point in its long course collapsed in immediate failure. It was not until mid-July 1963, when this attorney's brief for the appellees and work in the Court of Appeals (obtaining first an affirmance of the judgments, then en banc denial of appellant's petition for rehearing and en banc consideration of the cause) had been fully accomplished, and at a stage when, through this attorney's demands, efforts and persistence over many months, funds in partial satisfaction of the judgments were finally being paid over, that the plaintiffs revealed themselves and their methods of dealing. At this completed stage of the action they for the first time moved into the open with their until then smoldering contrivances designed to evade their contract and defraud this attorney of his fees. 1/

Although this attorney did not make the discovery of the deception and surreptitious occurrences until later, it was in mid-July 1963 that Herbert M. Neyland, while unctuously corresponding with this attorney, in pages filled with pious platitudes, was

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1/ This attorney, as the record shows, persistently demanded a supersedeas bond on appeal, particularly after the announcement of one Siciliano (who has from time to time and variously held himself out as a lawyer, on occasion for Weldon A. Price, on occasion for both partners, depending, apparantly, on what best served the needs, expediency and the particular representations he was making at a given moment) indicating he had advised the judgment debtor Price to "resist" execution proceedings in preference to complying with supersedeas requirements as are usual on appeal. Reference is respectfully made to plaintiffs "Points and Authorities in Opposition to Motion to Quash Interrogatories" in this file, setting out the circumstances in greater detail. This attorney, in protection of the judgments in the face of this bland declaration of their evasion, proceeded to act under Rule 69 F.R.C. P., and also to execute on the judgment debtor's property. In the course of these efforts to obtain supersedeas, the insurer through its attorney indicated a payment of $70,000 on account of the judgments would be made in the event of affirmance. Following affirmance in May 1963, and again in July 1963, after denial of the petition for rehearing, this attorney continued to press the insurer for these funds, and this attorney wrote Neyland in early July 1963 informing him of the imminence of funds for distribution under the judgments, whereupon Neyland shortly began to communicate with the insurer without this attorney's knowledge, and acted deceptively otherwise to defraud this attorney of his compensation.

almost simultaneously, without this attorney's knowledge, also communicating with the insurer's representative, surreptitiously and deceptively trying to have the funds in partial satisfaction of the judgments paid over directly to himself, his wife Susanne Neyland and Mr. Richard W. Galiher to the exclusion of this attorney in an effort to obtain control of the funds to evade the contract he is obligated under and to defeat and avoid payment of professional compensation to this attorney.

These are the facts in the matter. There are others of a similar nature, and yet others still to be determined.

At the time the consent order of distribution was entered on August 6, 1963, this attorney was not yet aware of the actual extent of the deception which had been practiced upon him, or of a number of the occurrences and conduct which for several months previously, apparently, had been carried on in derogation of this attorney's interests. Nor was this attorney until after August 6th aware of other factors and occurrences not only in interference with the attorney-client relationship and the right of contract, but in attempted derogation otherwise in an exceedingly irregular, if ineffective, manner.

Nor was this attorney fully informed on some of these facts when his petition to enforce his attorney's lien was formally filed in this proceeding, and that petition in consequence will be amended.

It is to be added that the order of August 6, 1963, was not the result of a hearing as required under Falcone v. Hall, 98 U. S. App. D. C. 363, Friedman v. Harris, 81 U. S. App. D. C. 317, and related decisions. /s/ Joseph O. Janousek, Attorney-Lienor.

Response and objection to motion to extend time within which to file record and docket appeal. (Filed October 15, 1963)

The attorney-lienor, Joseph O. Janousek, Esquire, has taken an appeal from an order to which his own attorney, John W. Jackson, Esquire consented. This represented the termination of a dispute which existed between the plaintiffs and Mr. Janousek over the amount of his fee. It is not believed that there is any basis for the appeal, and therefore, the matter should be disposed of promptly. Counsel for the appellees, therefore, notes his objection to any extension of time for filing the record in this case. /s/ Richard W. Galiher, Attorney for Appellees. (underscoring added)

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Notice of appeal (Filed September 5, 1963)

Notice is hereby given that Joseph O. Janousek, Attorney-Lienor herein, hereby appeals to the united States Court of Appeals for the District of Columbia Circuit from the order for distribution of funds in the Registry of the Court entered herein on August 6, 1963. Dated September 5, 1963. /s/ Joseph O. Janousek, Attorney-Lienor.

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Motion to dismiss petition to enforce attorney's lien, etc. (Filed September 17, 1963

Comes now the plaintiffs and move the Court to dismiss the petition to enforce attorney's lien on judgments and to order payment of the sum of $3,409.37, now held in the Registry of the Court, to the plaintiff Herbert M. Neyland. In support of said motion, plaintiffs refer to the points and authorities filed in opposition to the petition, and to the points and authorities attached hereto, which they pray to be read as a part hereof. /s/ Richard W. Galiher, Attorney for Plaintiffs.

BRIEF FOR APPELLEES

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,257

JOSEPH O. JANOUSEK,

*Appellant,*

v.

HERBERT M. NEYLAND,
SUSANNE NEYLAND, as next friend of
MICHELE MARIE NEYLAND, an infant,
WELDON A. PRICE,

*Appellees.*

Appeal From the United States District Court
for the District of Columbia



RICHARD W. GALIHER
1215 19th Street, N. W.
Washington, D. C.
*Attorney for Appellees*

## STATEMENT OF QUESTION PRESENTED

In the opinion of the Appellees, the sole question which may be presented here is:

May a former attorney for Appellees, set aside an order of the lower court, to which he has consented through counsel, and under which he has received substantial compensation?

# INDEX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,257

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JOSEPH O. JANOUSEK,

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v.

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SUSANNE NEYLAND, as next friend of
MICHELE MARIE NEYLAND, an infant,
WELDON A. PRICE,

*Appellees.*

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Appeal From the United States District Court
for the District of Columbia

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## BRIEF FOR APPELLEES

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### COUNTERSTATEMENT OF THE CASE

This appeal is brought by a lawyer Appellant, who, together with counsel for the Appellees, formerly represented Appellees in a malpractice action brought in the lower Court (Civil Action No. 4231-56) and appealed to this Court (No. 17,205, 115 U.S. App. D.C. 355, 320 F.2d 674).

Following affirmation of the lower Court judgment in this Court, the defendant in said malpractice action, Dr. Weldon A. Price, upon

motion duly filed, and with permission of the District Court, paid into the registry of the lower Court (in Civil Action No. 4231-56), as satisfaction of the judgment secured by Appellee Michele Marie Neyland, and as partial satisfaction of the judgment of Appellee, Herbert M. Neyland (J.A. 1-2, 6-7), the sum of $80,596.38; because of a dispute which had developed between Appellant herein, and Appellees over the amount of his claimed attorney's fees and expenses incurred during the course of the litigation.

Thereafter, with the consent of counsel for Appellant herein, and all interested parties, duly noted on the order, the lower Court, on August 6, 1963, ordered the distribution of said funds as follows:

(a) To Appellee, Herbert M. Neyland, the sum of $31,540.64;

(b) To Appellee, Herbert M. Neyland, the sum of $14,433.33 representing the share of the judgment in favor of Michele Marie Neyland, to be paid over to him after his appointment as guardian of the minor child;

(c) To Appellee, Herbert M. Neyland, on account of net costs taxed in the District Court and in this Court, the sum of $696.38;

(d) To Richard W. Galiher, as attorney's fees, related to the judgment in favor of Appellee, Michele Marie Neyland, the sum of $7,216.66;

(e) To Richard W. Galiher, as attorney's fees, related to the judgment in favor of Appellee, Herbert M. Neyland, the sum of $23,300.00;

(f) A further sum of $3,409.37 was to be retained in the registry of the lower Court, as a reserve for costs and expenses allegedly advanced by Appellant.

The lower Court further ordered that Appellant's claim to these monies should be supported by affidavit and that said claim would be subject to further order of the Court (J.A. 7-8). There has been no

further action taken by the lower Court with respect to these funds.

The total attorney's fees paid to Richard W. Galiher, as aforesaid, were in the amount of $30,516.66, one-half of said sum, or $15,258.33 was transmitted to the attorney Appellant in the form of a cashier's check payable to Appellant and said check was thereafter cashed by Appellant (See Appellant's Motion to Dismiss, p. 2).

Subsequently, on August 11, 1963, Appellant in proper person (J.A. 7-8), filed a petition to enforce attorney's lien on judgments, on funds to be paid on judgments, and for related relief. Therein he set forth a history of the case from his standpoint, the fact that a dispute had occurred between Appellee, Herbert M. Neyland, and himself over his attorney's fee, and he requested judgment enforcing his attorney's lien, and demanded also that he be given a "fifty percent individual and separate property interest in the judgment of $100,000.00 (on which there is an unpaid balance of $50,000.00)" and that the Court further vest in this petitioner, "fifty percent of all monies paid on account of interest on the said judgment from July 25, 1963," until the judgment is paid. This petition was never acted on by the lower Court (Appendix A, Order of Judge Hart, November 8, 1963) because on September 5, 1963, Appellant appealed to this Court from the order of August 6, 1963, which provided for the distribution of the funds in the registry of the lower Court.

Appellees pointed out in their points and authorities in opposition to Appellant's petition of August 11, 1963, that they had always stood ready to pay Appellant a proper and reasonable attorney's fee, that they did not believe his claim of 50% attorney's fee to be fair and reasonable, and that the lower Court had previously approved an attorney's fee of one-third of the monies collected in the case of the minor child. Further, they stated that the attorney's fee on any additional monies collected should be in the amount of 40%. Appellee, Herbert M. Neyland, stated further that he had always stood ready to pay Appellant for his

claimed costs, but that neither a proper explanation nor itemization concerning them had ever been furnished by Appellant (J.A. 22-23).

There is no basis to Appellant's claim that Appellees surreptitiously communicated with the insurer for the defendant, Dr. Price, or that they breached their contract with Appellant (J.A. 4). However, this is a subject for the lower Court to resolve when it acts on Appellant's petition to enforce attorney's lien.

## SUMMARY OF ARGUMENT

It is unfortunate that this Court is unable to conduct a hearing in this case which would permit it to fully understand what has taken place in the lower Court. This must be done, however, by the lower Court and this Court can therefore only review the record which reaches it. In any event, as pointed out in the motion to dismiss, Appellant has taken an appeal from an order, to which he consented, through his then counsel of record, and which provided for the distribution of funds paid into the registry of the lower Court, in complete satisfaction of one of the lower Court judgments and in partial satisfaction of the other. As Appellant's Statement of Question Presented indicates, he is attempting to assert a claimed attorney's lien, not to question the order to which he consented. And in the conclusion of his brief, he requests this Court to extend him the right to proceed in his own name to execute on the portion of the judgment remaining unpaid to Appellee, Herbert M. Neyland, to the extent of his claimed attorney's fees, and finally, that a hearing,if necessary, be given to him on his claimed lien.

As Appellees pointed out, in their motion to dismiss this appeal, Appellant's petition to enforce attorney's lien remains unacted on and undisposed of in the District Court because of this appeal, and because the lower Court judge believes he is without authority to act by reason of this appeal.

Appellant did not even file his petition in the District Court until after the order of August 6, 1963 was entered. Said order had nothing to do with the appeal presented here, or the argument made in this Court. This Court should therefore dismiss the appeal so that the lower Court may pass upon Appellant's petition.

## ARGUMENT

### I.

### The Order Appealed From Was Consented to by Appellant and He Has Made No Effort to Set It Aside.

The record indicates that following affirmation of the malpractice action in this Court, a dispute developed between Appellant and Appellees over his claimed attorney's fee. Appellant claimed 50% of the recovery and this was disputed by Appellees (J.A. 5). Thereafter, and in recognition of this dispute, the defendant in the lower Court action, Dr. Price, paid into the registry of the lower Court certain monies which satisfied one judgment in full, a second judgment partially, and certain interest and costs (J.A. 7).

Subsequently, on August 6, 1963, the Court entered an order providing for distribution of all of said monies with the exception of monies claimed by Appellant as costs and expenses. The order of the lower Court was consented to by Appellant through his then counsel of record and provided for distribution of all but $3,409.37 of $80,596.38, the amount paid into the registry. The attorney's fees approved in the case of the minor child, Michele Marie Neyland, $7,216.66, and in the case of the father of the child, Herbert M. Neyland, $23,300.00 were ordered to be paid to Richard W. Galiher, counsel for Appellees, and one-half of said sum, $15,258.33, was paid to Appellant.

The sum of $3,409.37 was ordered by the lower Court to be retained as a reserve for reimbursement for costs and expenses advanced

by Appellant, the disbursement of which was to be supported by affidavit, and subject to further order of the lower Court. Appellant never, thereafter, furnished proof to support his claim for reimbursement but filed the petition on August 11, 1963 to enforce attorney's lien.

Appellant states that the attorney which he employed (John W. Jackson, Esq.) agreed with him that the consent order was simply to carry out distribution of the funds in the registry of the Court without affecting Appellant's right of lien and right to enforce collection of the full balance of attorney's fee. Further, he contends that he did not consent or authorize the payment of the attorney's fees to another person in his behalf. His attorney consented to the order in his capacity as representative of the Appellant. Appellant accepted one-half of the attorney's fees provided for in the order, and thereafter, at no time attempted to set aside this order of the lower Court. The lower Court has not deprived Appellant of any of his rights. It is ready to proceed on his petition to enforce his claimed attorney's lien just as soon as the impediment created by this appeal is removed.

Appellant cannot, therefore, appeal to this Court from an order which he consented to, and he cannot raise a question on this appeal which has not been passed upon by the lower Court.

## CONCLUSION

This Court should dismiss the appeal because it has no proper basis in this Court. Alternatively it should hold that Appellant has no right to appeal from the order of August 6, 1963.

Respectfully submitted,

RICHARD W. GALIHER
1215 19th Street, N. W.
Washington, D. C.
*Attorney for Appellees*

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERBERT M. NEYLAND, et al.,
Plaintiff,

v.

WELDON A. PRICE,
Defendant,

v.

JOSEPH O. JANOUSEK,
Attorney-Lienor.

Civil Action No. 4231-56

## ORDER

WHEREAS This Court on August 6, 1963, signed an Order for distribution of funds in the Registry of the Court which Order was consented to by Joseph O. Janousek by John W. Jackson, Esquire, Janousek's attorney of record, and

WHEREAS on August 12, 1963, Janousek filed a Petition to Enforce an Attorney's Lien on Judgments on Funds to be Paid on Judgments and for Related matters, and

WHEREAS, on September 5, 1963, Janousek filed a Notice of Appeal from the Order for the Distribution of Funds to which he had consented by his attorney of record as above set forth, and

WHEREAS on September 18, 1963, Herbert M. Neyland filed a Motion to Dismiss Petition to Enforce Attorney's Lien on Judgments on Funds to be Paid on Judgments and for Related Relief and Motion to Pay Funds Now in Registry of Court to the plaintiff, Herbert M. Neyland, and

It appearing to the Court that the Appeal by Janousek from the Order which he consented to by his counsel of record as above set forth, is still pending, it is by the Court this 8th day of November, 1963,

ORDERED That action by this Court on the Motion to Dismiss Petition to Enforce Attorney's Lien on Judgments on Funds to be Paid on Judgments and for Related Relief and Motion to Pay Funds Now in Registry of Court to plaintiff, Herbert M. Neyland, shall be stayed until the Appeal pending in the United States Court of Appeals for the District of Columbia Circuit is disposed of and the case returned to this Court at which time this Court will act on said motions.

/s/ George W. Hart, Jr.
JUDGE

# REPLY BRIEF

UNITED STATES COURT OF APPEALS

For The District of Columbia

No. 18,257

JOSEPH O. JANOUSEK,

Appellant,

v.

HERBERT M. NEYLAND,
SUSANNE NEYLAND, as next friend
of MICHELE MARIE NEYLAND, an
infant,
WELDON A. PRICE,

Appellees.

Appeal From The United States District Court

For The District Of Columbia

JOSEPH O. JANOUSEK, Pro Se
Box 284 Benjamin Franklin Station
Washington, D. C.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

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No. 18,257

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JOSEPH O. JANOUSEK,

Appellant,

v.

HERBERT M. NEYLAND,
SUSANNE NEYLAND, as next friend
of MICHELE MARIE NEYLAND, an
infant,
WELDON A. PRICE,

Appellees

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# REPLY BRIEF

Both in his motion to dismiss the appeal, in his reply to the appellant's opposition filed to that motion, and again in the brief he has filed renewing his motion to dismiss, the attorney who styles himself as "attorney for appellees" has included assertions requiring correction. Some are merely inexact, others are shaded by extreme inaccuracy, while yet others are untruly made standing unsupportable in the record or by fact.

In the order denying the motion to dismiss the appeal this Court did so without prejudice. The motion is renewed in the brief now filed by that attorney in the name of "the appellees".

This Reply Brief is accordingly addressed primarily to the assertions

thus inaccurately and untruly made, and to some of the contentions urged, both in the brief and in the earlier filed motion to dismiss on which the appellant has until now had no opportunity to respond. 1/

I

The Actual Status Of The Parties
Who Appear In This Appeal

A brief has been filed in the name of the appellees by Richard W. Galiher as their attorney. Unless without the appellant's knowledge there have been additional drastic attempts at realignment made, without deference to prohibitions barring the representation of conflicting interests, that attorney does not appear for the appellee Weldon A. Price.

Nor can he with any greater propriety appear for Herbert M. Neyland or Susanne Neyland, in similar inconsistent and interest-conflicting realignment, against the appellant without violating prohibitions against the representation of conflicting interests and basic rules regulating professional relationships and conduct. 2/

Hence that attorney in designating himself "attorney for appellees," now in realignment against the appellant who brought him into the case and with whom he stands in professional relationship and under professional contract, who attempts now to appear as attorney for the appellant's clients he has designedly

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1/ The appellant filed opposition to the motion to dismiss. However, the moving attorney thereafter filed a reply bringing in new matter. That reply embodies statements and representations that are not true. The appellant did not respond inasmuch as no response is allowed under Rule 31 of this Court. The renewal of this motion in the brief now filed in the name of "the appellees" requires correction of those statements and representations in the appellant's Reply Brief.

2/ Footnote 2 appears on page 3 following.

alienated and whose breach of contract he has procured, has passed beyond the brink of the quagmire of dual representation and conflicting interests, where, in contravention of professional rules and practices, he at this moment stands in an irreconcilable position.

The appearance he styles as in a representative capacity for the appellees is in reality an appearance made in his own interest, as have been his appearances in conflict of interest in the District Court where he has sought to stifle appellant's rights and interests by roughshod methods.

II

The Appeal Is Essential To Construe An Order Being Employed To Deprive Appellant Of Basic Rights In The District Court Proceeding.

The appellant's brief sets out the facts and the construction being urged on a consent order contrary to its limited scope and purpose at the time it was entered.

In reply the appellant respectfully states that were this appeal not now taken, or if the appeal were to be dismissed as is being urged in the brief filed in the name of the appellees, efforts would most certainly follow in the District Court

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2/ The appellant has represented the Neylands under a contract providing, among other things, for payment of professional services contingent upon the outcome of the malpractice claims. Appellant's services have extended over seven years, from initial development of scientifically nebulous claims, the later filing of suit and on through further development, their establishment, appellate affirmance and collection of a substantial part of the judgments. In the very latter part of this span of professional services the appellant brought Mr. Galiher into the case to work with him as associate attorney under the appellant's direction. The associate was unacquainted with appellant's clients, has not had any contract or contractual relationship with them, and has been authorized to act only in an associate capacity. His contract is with the appellant and provides for the payment of his fees by the appellant. His only entitlement to payment is under his contract with the appellant under which he served until late July 1963 (when all work, save for the receipt of a substantial sum on the judgments, was accomplished), when he directed the appellant's clients in their breach of contract and thereupon attempted to assume control of the case. Similar acts have been declared professional encroachment and condemned in rulings made on the Canons of Professional Ethics.

to employ the order under consideration and the erroneous construction being urged on it to deprive this appellant of his basic rights and hearing on his petition of lien in circumscription of this Court's decisions on the subject. And in the absence of an appellate ruling, were the consent order to be construed in the District Court to limit or preclude basic rights of lien and hearing, an appeal, or successive appeal, would become necessary and would inevitably follow.

There is no prematurity in this appeal in any sense or in any respect. The construction being urged on the order to defeat rights of lien is a present one.

Indeed the attorney who urges dismissal of this appeal for further proceedings in the District Court has, with the aid of the consent order and the construction he attempts to impose on it, already begun to stake out his course in the District Court to deprive the appellant of a hearing and rights basic under appellant's judgment and lien. That attorney has moved in the District Court to dismiss appellant's petition to enforce his lien. The motion was made after notice of appeal had been filed in this appeal. That attorney insisted upon a ruling on the motion by the Judge to whom he had had it directed for hearing, notwithstanding the District Court's divestiture of jurisdiction during this appeal. (J. A. 27) It became necessary for the appellant to move for a stay of that motion. The motion to dismiss appellant's petition to enforce his lien has been stayed pending this appeal.

And indeed, that attorney, aided by the personal construction he places on the order appealed, has in his pleadings filed in the District Court already declared himself against a hearing on the petition notwithstanding the right of hearing declared in this Court's several decisions. In his opposition to appellant's petition to enforce his attorney's lien that attorney insists:

". . . . the Court should deny the petition which attempts to enforce an attorney's lien and should simply pass an order with respect to the amount that should be charged in the way of attorney's fee should any additional sums be collected." (J. A. 23)

## III

## Reply To Assertions In Motions

The motions filed separately and made in the brief embody assertions that are neither within nor supported by the record, several contrary to fact and requiring reply and correction.

First, suggestions and representations that there was a hearing prefacing and leading to the consent order appealed are wholly incorrect. There was no hearing whatever. The consent order was entered exactly as related in the Brief for Appellant and was limited in its scope and operative effect to funds then on deposit in the Registry of the Court, and, as entered by consent, was not vested with any future operative effect beyond the distribution of those funds. As also pointed out in the appellant's brief, the order contained a provision which was neither authorized nor consented to by the appellant. (Appellant's Brief, page 5.)

The "anomalous" position which the opposing attorney described as his position in the motion filed to dismiss the appeal does not even pass as a euphemism. The appellant respectfully says that gilding and casuistry do not change or relieve facts and the results of acts of inducement and provocation in interference with an attorney's contract and relationship with his clients.

Other representations made in the motion are little short of sheer fabrication and necessitate this reply:

The appellant worked with his clients -- conferred with them personally and vis-a-vis, and incessantly, going over facts and testimony and working on trial preparation with them throughout November and December 1961, January, February and March 1962, as well as in the preceding several years of work appellant had devoted to developing and making cognizable their claims.

Again after the judgments had been entered in the District Court in March 1962, the appellant further conferred personally and vis-a-vis with his clients; and he continued to confer and constantly communicate with them, keeping them currently and fully informed during the time the appellant was defending the appeal, also throughout the time appellant was demanding supersedeas and during his later steps in the District Court in execution and in aid of execution on the judgments after supersedeas had been refused.

The appellant's contract made with his clients in 1956 (which is set out in the Joint Appendix filed in this appeal) is and was eminently clear, agreeable and agreed to by Herbert M. Neyland who had for more than two years before coming to the appellant been circulating in search of assistance for himself and his child on nebulous, undeveloped and, at that time, dubious claims of malpractice in a field of medicine eminent experts have declared one of the most complex in medical science. In 1956, after the appellant had for many months investigated and studied the claims and had conferred on them medically, and had then consented to go forward on them, Herbert M. Neyland unhesitatingly agreed to a customary fee scale and contract adapted to the circumstances of these claims.

Again in early 1962 the contract fee scales were before Herbert M. Neyland, as he considered a nominal offer of settlement as against trial and likely appeal,

when this appellant conferred and talked with him at great length on numerous occasions trying to put factors of cardinal consideration before him to enable him to come to his own decision. (He asked the appellant to make the decision and said he would follow it, which the appellant declined.) The several fee and cost differentials which would apply were the case then settled, or, on the other hand, tried and appealed, were again discussed with the settlement being considered; and at that time the client expressed no dissatisfaction with the contract of 1956 and the fees to be paid under its terms.

There has indeed been no "violent dispute" over fees at any time, There was complete understanding and general cooperation on the part of the Neylands (who have both orally and by written communication to the appellant expressed gratitude to him for his professional aid and work in handling and prosecuting the claims), no disagreement or question made on their contract until they were manipulated and induced by Mr. Galiher into gradual breaches, culminating in mid-July 1963 in a letter they prepared and mailed under Mr. Galiher's prompting, aegis and direction, dismissing the appellant. Almost simultaneously followed Mr. Galiher's notification to this appellant that he now represented the appellant's clients -- since accompanied by his efforts to obtain all fees and his appearances adversary to this appellant in the endeavor, notwithstanding his contract and the professional relationship and responsibilities existing. 3/

As appears in the record on appeal, the letter purporting to discharge the

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3/ The denial that the Neylands surreptitiously communicated (with Mr. Galiher) with the judgment debtors' insurer in an endeavor to obtain the funds to the exclusion of the appellant, fails in the face of correspondence, statements and other data in the appellant's file giving the precise details of the endeavor.

appellant in breach of the contract with his clients, came at a time when the appellant's work and professional services of some seven years had been fully performed, and at a point when the appellant had forced the imminent payment of about $80,000 on the judgments and interest.

Representations by the opposing attorney that he has blindly entered employment in a case as associate attorney on an agreement to "split equally" the fees, without discussing or knowing the means and method by which he is to receive payment for his services, the source of the equal "split," or what his percentage would be, and representing that he had no knowledge of the principal attorney's contingent fee contract with his clients, which would determine the amount of the "equal split," is, to say no more, a strain on credulity.

The fact is that before entering the case as associate at the suggestion of the appellant, the appellant and this associate, not in a single but in several prefatory discussions went over, among other details, the contingent fee arrangement and contract of the appellant with his clients, upon which, if recovery were made, the division of fees between the appellant and his associate would be founded.

This appellant wrote the brief for the appellees in defense of the malpractice judgments to the accompaniment of and despite Mr. Galiher's pessimism and fears that he was on a lost cause, emanating from his lack of background in and understanding of the medical science underlying and governing the liability which was controverted on appeal.

It is respectfully submitted that the motion to dismiss the appeal be denied, that the order appealed from be construed and that the Court grant the order and judgment as prayed in the Brief for Appellant. Respectfully submitted,

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